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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 533

EDYTHE RICE DYER,
PETITIONER,

v.

EDWARD P. MURRAY, as successor trustee under the Will of the late JOHN CASSIDY, JANE MURPHY SULLIVAN, ROSELLA MARIE CASSIDY FLYNN, and JOAN CASSIDY STETSON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE, SITTING AS THE LAW COURT

MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

The Respondents, Joan Cassidy Stetson, Roselle Marie Cassidy Flynn, Barbara Ann Cassidy and John Cassidy, deem it unnecessary to file the usual Brief in Opposition and instead they file this Memorandum as they consider

this case clearly to be the kind referred to in *Stern and Gressman's Supreme Court Practice, 2nd Edition,* Page 221 as the type of case "in which a very short statement of pertinent facts and argument will clearly demonstrate that the case is not of the sort to be reviewed by the Supreme Court" and that "the Court will accept a short memorandum without headings in such cases".

The most cursory reading of the Statement of the Case in the Petition makes it obvious that the issue involved in this case is the construction of the Will of a Maine decedent. The Will was executed in Maine and the decedent was domiciled there at the time. It is impossible to conceive a case in which it is more obvious that no federal question whatever is involved. No federal statute is involved and none could be nor was any state statute which in any way is in conflict with any federal statute or the Constitution of the United States. The petitioner's attempt to invoke the Fourteenth Amendment is ridiculous in the extreme. It needs no citation of authorities to support the rule that the decision of a state court on a matter of local law, however erroneous, does not lay the basis for jurisdiction in this court. If it did, the court would be overwhelmed with litigation. This petition is about as close to being frivolous as it is possible to be.

If this were not enough, it is equally apparent, from the record, that the petitioner never, at any time, raised a federal question in the original proceeding. The petitioner attempts to get around this by invoking the so-called "surprise doctrine". In this case the "surprise" appears to be solely that the case was decided against the petitioner. This hardly complies with the requirements of the "surprise doctrine". See *Saunders* v. *Shaw*, 244 U.S. 317 at Page 320, 61 L. Ed. 1163 at Page 1165 where the court says, "The question remains whether the writ of error can be maintained. The record discloses the facts but does

not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

Obviously that is not the case here. The "surprise", if any, in the case at bar, of which the petitioner complains, was apparent after the original decision of the Maine Supreme Judicial Court which gave petitioner ample opportunity to raise any federal question in her petition for rehearing. Yet that no more raises a federal question than all the rest of the proceedings. See Appendix A. There was a good reason for this for as we have seen supra no federal question whatever is involved.

For these reasons, the Respondents, Joan Cassidy Stetson, Roselle Marie Cassidy Flynn, Barbara Ann Cassidy and John Cassidy, respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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Appendix A

PETITION TO
SUPREME JUDICIAL COURT OF MAINE
For Review re:
ESTATE OF JOHN CASSIDY

On behalf of:
EDYTHE L. DYER

June 5, 1962

THE ISSUE

The apparent question (of the moment) of which we are concerned with, is (PROPORTION). The proportion of the vested estate, that each of John Cassidy's lineal descendants, are to receive.

The wills reference to the statute, incorporated the statutes double function, (manner) and (proportion).

Note- The manner is provided for in the will, the "lineal descendants" are known.

Note- The Cassidy heirs are now known without question.

Note- The issue is *proportion.*

Mr. Cassidy in (1906) had no way of knowing what combination of his lineage would survive him or whom he would survive.

Note- *Nobody questioned the statute prior to 1906:*

There was no question about the descent statute, *meaning anything* except, exactly the way it appeared to read. If he had intended otherwise his attorney would have said so. He must have believed he accomplished it all in the statute. (All Maine cases recently cited were decided after the will was made; actually after the testators death).

Mr. Cassidy provided for *his children,* as he believed best (in a trust) and intended to vest the remainder of his estate in his lineal descendants, (whoever they might be, in whatever combination and nearest relationship to

him, that they might be, after the termination of his trust), after the decease of his last child.

The Possible Lineal Descendants: of John Cassidy when will was made. (1906) were many.

Contingent Ways Estate Could Have Vested:

Testator to predecease:

1- All of his children
2- Some of his children (only)
3- Some of his children and one grandchild
4- Some of his children and two families of one or more grandchildren
5- Grandchildren only
6- Grandchildren and one great grandchild
7- Grandchildren and two or more families of one or more great grandchildren
8- Great grandchildren only
9- His Sister, *Ellen Hurley* (*similar as above*)
10- His Brother, *Barney Cassidy* (*similar as above*)
11- No lineal or collateral heirs
12- Also possibility that all or some of these people might have (predeceased the testator).

Obviously Mr. Cassidy believed with good reason that by adopting the descent statute he had a ready made, reliable *crutch* for his *will*. That his estate would be distributed on a per stirpes basis unless all of his children should predecease him, — which would be a most unlikely contingency.

Every ray of light cast from his will showed (per stirpes) family equality. Having no countervailing legal precedents, his attorney, Matthew Laughlin, and he, read the Descent Statute at its *face value* in (1906), believing and hoping to bring about a result, as they understood the

statute, to determine the manner and proportion for each contingency.

Proportion

On this point the statute regarding his grandchildren is *specific*. Stating that the remainder of which Mr. Cassidy died seized, "shall descend in equal shares to his children (trust prevented) "AND" to the lawful issue of a deceased child by right of representation.

This the statute so provides and was his assurance that equality between the families of his children would be preserved, unless all of his children should predecease him (which was most unlikely). The second sentence in the statute was his safeguard (AGAINST) a per capita distribution unless all of his children should predecease him.

It is clear that Mr. Cassidy intended distribution by right of representation. He obviously tied his will to the statute, *relying* upon it to accomplish exactly what it said.

The Statute

> Therefore it should be interpreted literally as it appears and previous to any reported decisions from the Supreme Judicial Court of Maine, that the actual date of a man's death (*could* or *might*) be *artificially* advanced, thereby in effect bringing about a result which he could not *reasonably anticipate* (in 1906). We owe him the benefit of the doubt.
>
> This is also one of the reasons we feel justified in requesting a review for further consideration by the court of *relevant FACTS*.

Believing that the court is interested in having the Cassidy case decided right, with the utmost of respect for the court's findings, and with these humble words from untrained legal minds, we respectfully request the court to take another look and if it pleases the court to grant a formal final review.

We trust you will accept this work of sincere people who

believe with conviction, that this petition is justified and worthy of your further consideration.

Edythe & Ralph Dyer
Bangor, Maine
June 5, 1962
(s) Edythe Rice Dyer

Intention

Of course it is now impossible to know or guess what John Cassidy had in mind when he wrote his will and codicil, now that he is dead. However his intentions, wishes and directions are represented by *his will*, which speaks for itself as of the date of his decease.

We are reliably told that Mr. Cassidy was a successful, intelligent businessman, apparently normal in every way and a good respected citizen of Bangor, Maine. Therefore he was probably much the same as many other businessmen.

The obvious question is: — what would another man of equal stature or even you or I do under similar circumstances:

Let's suppose for a moment that my name is John Cassidy, I have just written the last codicil to my will, the date is May 4, 1910, I am (68) years of age. I am worth approximately (4) million dollars. I have (5) living children, my (3) daughters are not going with or marrying the people I had hoped they would. Only one of my children, (James W. Cassidy) is alert to the ways of business. My children are jealous and quarrelsome. My attorney has helped me write this my last will.

Briefly it does some of these things for me *

1- "I, John Cassidy, hereby made, publish, and declare this my last will and testament, *herein disposing* of *all my estate*, real, personal and mixed."

* "quoted in part" — (added comment)

"After payment of all just debts, funeral charges and expenses of administration, *I dispose* of *all the remainder* of the estate *as follows*"

2- I "declare this my last *will* and testament "*herein disposing* of all my estate".

3- "*I dispose of all the remainder of my estate as follows*"

"(that I own or *possess at the time* of my decease)"

4- "I *give*, bequeath and devise to my son and my daughter to have and to hold to them and their heirs, assigns and successors, *forever* in *trust*, however for the following purposes and *trusts*". (Whereas I have (5) children, a grandchild and I am a widower).

5- My "said trust shall continue until the decease of all my children *namely*, said James W., Mary A., Rosella, John F. and Lucy C. Cassidy, all of said Bangor", (here I *recognize* and *name my* children, whom I *expect* and hope *will be living at the time of my decease*.)

6- "My trustees are to control and manage all my said estate real, personal and mixed". "In brief, without further specification in detail, my said trustees shall have full power and authority to do and perform in the same manner *as an absolute owner would*".

7- "I expressly direct that neither my said trustees, nor their successors, shall have *any power of authority in any manner whatsoever* to convey any part of any of my real estate, of any name or nature, wherever found, or situated, that *I* now own or possess or may own or possess *at the time of my decease*." "This express prohibition against any such conveyance of real es-

tate to continue *as long* as this *TRUST continues*, namely, until the decease of each and all of my aforesaid five children, above particularly named":

Therefore there can be no doubt that:

A- no part of my estate will vest a fee in any of my *children*, during their lives.

B- that My particularly *named* children *are expected* to be *living* "at the time of my decease".

C- and that my *will* speaks and directs my trustees "at *the time of my decease*"

D- the whole directive applies only to *my trustees* and *my children*.

E- the trust terminates, after the decease of my last child.

8- "I direct that in no event shall *any* trustee under this will, at any time, receive any commission upon the body of my estate or its income". (I am not foolish, this is one of the reasons I have my own trustees on a salary basis.)

9- "During the continuance of this *trust*, the trustees of *my estate* shall provide for the comfortable *support* and *maintenance* of *each* of my said five (named) children, during the life of *each of them* "AND" at the decease of each of them, *then* of the lineal descendants *together*, if any, of each of them, to an amount not exceeding for each *child* — $10,000.00 per year, *beginning at the time of my decease*.

Special Notice (is given to this paragraph, especially to the *words used* and the style of composition used).

A- "my estate", — I consider it to still be my property in trust.

B- I am providing (only) for the *comfortable support* and maintenance of *each* of my said five named children.

C- *Notice;* that no title or fee passes.

D- Notice that there is no doubt about the fact that I recognize, expect, hope and intend to provide for *my said five named children, then living.*

E- "*beginning at* the *time of my decease*".

Note: The words "my children"
"during the life of each of them"
"AND"
"*and*, at the decease of each of them"
"*then* of the *lineal descendants* together of each of them"
"lineal descendants"
"*beginning* at the *time* of my *decease*"

These words are repeated over and over and will finally be used in the final distribution clause, with equal meaning and intent.

Let's see how they are used next!

10- "In addition to said sum not exceeding $10,000.00 per year, as aforesaid, '*if any one*' or more of my said five children should desire to live apart in a house by himself or by herself in any of my houses, in said City of Bangor, then the trustees of this *will* for the time being, shall designate one of my houses for *each one* of my said *five children*, so requesting it, and after the death of each of my children, for the lineal descendants, if any of *each* of *my* said children, free of rent".

Note A

I direct the same per stirpes style or pattern.

Note B

The words, my "*lineal descendants*" are identified as being "*the lineal descendants of my children*".

Note C

That no title, no fee, no lease passes — they are for all purposes tenants, subject to certain discretionary authority given to my trustees, who are "same as an absolute owner" — the title thereof is in the name of the trustees.

11- "Any income from *my* estate, not necessarily used in carrying out the foregoing provisions of this will, shall become a part of the body of *my* estate, and be invested from time to time by my trustees, *in the same manner* as afore particularly specified."

Note A

Any income from my estate, not used, shall become a part of the body of *my* estate.

Note B

The continued grammatical use of the words, "my estate" "in the same manner".

12- *The Will Termination Paragraph*

A- "*Upon the termination of this trust*"

(A specific "*time*" is directed)

B- "*Namely after the decease of all my five named children*"

(*Note* — an event which must occur at a definite "time" *only after* the decease of all five children)

C- "*All my estate in whatever form the estate shall then be shall then rest in*"

Note

I refer to my estate, in whatever form it shall *then* be.

Note

"All my estate", of which I died seized" — "shall then *vest in*"

D- "*And become the property of all of my lineal descendants*"

Note

at this specific time MY estate shall become the property of

Note

"my" lineal descendants

Note

I limit and restrict all descent *first* and only to MY lineal descendants, not to *MY children*, which I provided for in a *trust*.

E- "*If any then living*"

(lineal or collateral descendants)

F- "*In the same manner and in the same proportions*"

(Note — the same *manner* and *proportions*)

G- "*As shall (then) be provided by the (then) existing (laws) of Maine*"

(Note — intent to use the *laws* of Maine, *then* in effect as a guide)

H- "*For the Descent among lineal descendants of intestate property, real and personal*"

Note

"Descent"; I requested "my" estate *to descend* "in" and "among" — "my" lineal descendants *according to my will* in the same *manner* and *proportions* as provided for intestate property by laws of Maine (then in effect).

Note

I (my trust) retains title to it until "after". "Namely, after the decease of all of my five named children". Only then shall the estate vest *in* "my" lineal descendants. As *directed in this will as of the date of my decease*, for all property of which I died seized.

13- "It being my express intention that no part of the body of my estate real, personal or mixed, shall vest in *any person or persons* until the time above especially fixed for the termination of this trust".

Note A

"(*no part* of the body of my estate shall vest in any person or persons, until termination of this trust)"

Important Note B

*Therefore; cases cited such as *Lermond* vs. *Hyler* 121 Me. 54—are poor guides because no fee or interest passed to Mr. Cassidy's lineal descendants, at his decease (vested—contingent or conditional). The children had no estate to pass from or through their lineal descendants or next of kin, (directly or collateral).

*This case and others cited like it were subsequent to the time Mr. Cassidy wrote his will in 1906.

*Most of the cases pertained to (manner) to uncertain or unknown heirs, not to statutes.

14- *Distribution*

A- (The *eye*, the *hinge*, the focal point of the will revolves around the utilization of the Maine Descent Statute) (as to proportion).

B- *My will clearly states that*
I "hereby make, publish, and declare this my last will and testament, herein *disposing* of all my estate". See (1) and (2).

15- In Brief:
"my said trustees nor their successors, shall have any power in any manner whatsoever *to convey* any part of my real estate" — "*as long as this trust continues*", "*until the decease* of each and all of my aforesaid five children, above particularly named".
"I give and bequeath", — "at the time of my decease", — to my trustees, "to have and to hold" — "forever", — "for the following purposes" — "to *carry out* the *provisions* of *this will*, and to convey and transfer the same, insofar as it may be necessary, to the *persons* who *shall* be *entitled* to the same, as above specified".

16- *Distribution Time*
"After the decease of all of *my* five named *children*, all of *my* estate, in whatever form the estate shall then be, shall *vest in* and become the property of all of *my lineal descendants*"
A- *then* living
B- in same manner and *proportions* provided by
C- *then* existing laws
D- for *descent* among my lineal descendants
E- of intestate property.

Important Note
A- My children, were provided for in the trust; that is terminated upon the death of MY last child
B- The children, have no estate to pass on to *their lineal descendants*

C- However, if any of their lineal descendants are then living, they are also *my* lineal descendants!

D- I reserved the right to (for my own reasons) for my estate to then vest *in* and become the property of MY *lineal descendants* "then living" in the same manner and proportions as shall then be provided by the *then* existing *laws*, for descent among *my* lineal descendants", "as intestate property".

17- All and whatever *right, title* or interest I had, *have* or *reserved*, to my estate, under the terms of my will and which my trustees "defended", "protected" and "preserved", I *now instruct my trustees* to convey and distribute the same:

"to the persons who shall be entitled to the same, as above specified".

18- This being the same property, of which "I died seized", and which I gave, bequeathed, and devised, "at the time of my decease" in my will, to my trustees. Now that all of my children are deceased, 44 years have passed since my decease, there seems to be some question about how. I wanted my will to be modified by the conditions of the Maine Descent Statute.

19- My whole will is obviously dominated by

A- a trust which I created *FOR MY CHILDREN* to prevent them from spending the corpus of my estate.

B- there can be no doubt that I was aware of the fact that I had (5) children living when I wrote my will. (therefore) I did not intend to die without children.

C- nor *did I do so*, as everyone very well knows.

D- nor did I intend for them to die before me.

E- It may be of interest to note that my daughter Rosella died (May 25, 1915) leaving a daughter who was (3) years old when I deceased. This child, her only daughter, was the first of *my lineal descendants* to fall within the final pattern of my will, as the other families would eventually do, in time.

There can be no doubt that Edythe Rice Dyer — (Directly and Immediately) represents me, by *Right of Representation*, as of the date of my decease (March 25, 1918).

Rosella left her child no estate or interest (in my estate) at the time of her decease, (March 25, 1915) BECAUSE I WAS ALIVE.

However Rosella's family share (in my will) went to her *issue*. During Edythe's life she was provided for (the same) as one of *MY children*.

Quote Will: "then to the lawful issue of a deceased child by right of representation".

A- with support and maintenance payments.

B- with the residential provision for a home.

C- AND finally to represent ME, (and or her mother), when my trustees, "carry out the provisions of the

will" — "to the lawful *issue* of a deceased child by right of representation."

Therefore the descent statute must recognize that I intended to die with children and also with (2) grandchildren living prior to my incapacitating illness.

20- All this talk about how I intended to modify my will by finally using the statute is a bit humorous. I would have to die after June 9, 1961 (who knows when) in order to outlive my children — if the (so-called) conditional second half of the statute is used.

The court has assumed that the second part of the descent statute must be applied (quote) "as though the testator's death occurred after the death of his last child" — "so that the condition that no child is living is satisfied".

Something Must Be Wrong!

The second half of the statute is my protection AGAINST a per capita distribution.

If it is assumed that I predeceased all of my children (in order to comply with the so-called second half of the statute) there was no need to invoke the statute.

Because, no child was living at the (theoretical) time of my death.

A- the trust (theoretically) never existed.

B- my intentions in my will for my children and lineal descendants was all wasted effort. My directions and wishes to my trustees are null and void, because my estate would have to vest immediately as intestate property as of the date of my death.

C- My will is incomplete.

D- If I am today dead without a trust or trustees without even the statute (which the trust was to utilize as a guide) then my will lacks clarity.

E- Therefore my estate is intestate from the start. My estate is cast into (involuntary statutory intestacy) as of the actual real date of my death, March 25, 1918.

F- There are no provisions allowed for my sister or the contingent provisions for my collateral lineal descendants whose role in my estate, to this date have been unknown.

The aforesaid theory is definitely not my plan, pattern, intention or wish.

If I die as I contemplated (1918) when I distributed my estate, by will, with the help of *my* trustees everything will read harmoniously.

A fellow cannot expect to die and take his money with him, or to be allowed to get a second chance at a later (legal) death date.

I always thought, the pattern of a man's will and his intentions shown therein was all important. However how a fellow *with children* writing a will or planning to distribute his estate (in the same manner and proportions as prescribed for the descent of intestate property) would be (') if he, (looking right at the statute) planned on utilizing the second half to vest his estate (specific grammatical integrity should answer any doubts about that).

21- The statute reads clearly, with the utmost of simplicity.

A- "The remainder of which I died seized"

B- "The whole shall descend to my children" (deprived by trust)

C- "AND" (and/or) to the lawful issue of my deceased child by right of representation" (which is the only way Edythe Rice Dyer can take — whereas her mother pre-deceased the testator).

D- "(If) no child is living at the time of my death (1918)"

E- "To all my lineal descendants equally, if all are of the same degree of kindred". (This sentence would have applied if (I) had died *without children.* The estate would have (then) vested in 1918 to my *lineal* or *collateral* descendants, then living, *no* trust would have ever resulted). — If *none* of my children were living at that time.

The statute continues:

F- "If not according to the right of representation". This sentence would have been used if my children were all deceased and my surviving (1918), lineal or collateral descendants were not of equal degree of kindred.

22- *Thus:*

The whole statute is logically *utilized* (as any average lay man would use it) — nothing is omitted or offended. No statutory requirements are assumed which require me to die (in order to utilize the statute) the will takes care of that automatically. There is only one way the statute can be used without false assumption. We must remember that the estate *never vested* in any of

my children or lineal descendants prior to June 6, 1961.

We must realize that the intestate statute (is recognized to be) designed by the legislature to function, only at the death of (any man) intestate. I would be apprehensive about applying it to an estate (44 years) after a man's death. It is just not cricket to do so, the prescedent is precarious and seems somehow basicly untruthful to actually assume a man died 44 years after his actual death. Taxes and things being as they are, might get an estate into trouble.

The statute is the *canon of the law* — a standard — a pattern prescribed for all men alike.

If I wrote a will copying or utilizing the statute after my last child's death as a vehicle or method for my convenience to "then" distribute *my estate* to *my* lineal descendants (that was my will speaking) as it spoke and has spoken ever since March 25, 1918, not the statute.

The statute should not compromise itself in whole or in part to "assume" I died in 1961 so that a part of the statute can justify the distribution of my estate in some questionable ambiguous way.

A mold, a form, a pattern can only fit exactly that which it designed, a statute is equally fatal to deviation.

The descent statute should not be applied "so that the condition that no child is living is satisfied", nor do I believe the legislature ever heard of or contemplated such (for a man who died in 1918 to be assumed to die in 1961 so that the statute can be applicable).

There are Two Considerations in The Will

(A) Did I intend to die March 25, 1918 with children and vest my estate in my trustees for them to later distribute (for me) as "an absolute owner", to *my* lineal descendants then living —

(If so then I intended to use the first part and main body of the descent statute)

OR

(B) Did I intend to use the descent statute after the death of my last child as though I died without children (presumably after) June 1, 1961.

(If so I intended to use the (IF) condition in the second part of the statute.)

The Descent Statute (to function) asks only three questions about John Cassidy.

1- When did I die?
2- Did I leave a widow?
3- Did I die with children?

That is as far as the statute goes — any questions or conditions after that are not to be considered, because they are irrelevant to the FACTS.

Final Distribution:

The EYE — the HINGE, the focal point obviously evolves out of my whole will, (the style and pattern) (the directions) the (continued use of synanamous words) and the (descent statute) as a standard legally accepted, and a ready made guide for my trustees.

With all respect for the court's assumption, it is difficult to see where I intended to employ the 2nd future legislative method, unless all of my children should die before me.

The second portion of the statute can only be utilized if we assume I died in 1961. Why should we want to assume I died in 1961, in order to utilize the (second legis-

lative method)? The *will* does not request it, the *statute* does not demand it.

Although the will spoke and functioned as of the death of the testator, it only requested the use of the law in effect *as of 1961* which was the same as in 1918, as I presumed it more or less would be.

It is possible therefore, without offending the *will* or the statute to say that the will *spoke* in *1918* AND *used* the *1961 statute* exactly as directed.

If we admit that I died in 1918, which I did, we *can* still *use* the *1961 statute*, the *whole* statute then has *continuity* and meaning *in every word*.

To Prove: rationally the estate can only be distributed *by right of representation*, "AND to the lawful issue of a deceased child".

Let's ask:

Q. Why does the court want to satisfy the condition "that no child is living"?

A. Because that was required in MY *will* and the basis on which the trust was created, continued, functioned and terminated. Whereas I did have children living at the time of my death, Mar. 25, 1918.

Q. If the condition was in the *will;* and the will *spoke* and functioned effectively as of MY death; carrying out MY every wish; and the trust could not terminate until after the decease of all of my said five named children, then why isn't that what I wanted?

A. It is!

Q. Why involve the statute with the *termination condition* in the *will*? (quote court) "so that the condition that no child is living is satisfied?"

A. The double function of the statute, (manner) & (Proportion) is utilized only as to (proportion) — the "heirs" admittedly are known. (manner) and the ter-

mination clause in the will, it should not be involved. The *will* and the statute each *speak for themselves.*

All the testator asks of the statute (in the will) is that it shall be adopted and applied, "in the same manner and *proportions* as (then provided by the then existing laws of Maine) for the descent among lineal descendants of intestate property real and personal".

My named children are presumed and presumable accepted as *in being* as of the date of my death (although one was deceased with issue).

Note.

The will requires a preceding condition or event to occur in order to vest the estate.

The statute prescribes only manner and *proportions,* if certain facts exist at the decease of the testator.

(Two different situations exist.)

It is "jury certain" that in the body of the statute — "the whole shall descend to his children, AND" (if none living) (and/or) to the lawful issue of a deceased child by right of representation, is what he intended. Just exactly as the statute reads and the way all the rest of the will reads. We need only to admit that Mr. Cassidy died March 25, 1918, when he did die, and the whole ambiguous dilemma is as simple as truth itself.

IMPORTANT NOTE

One word in the statute and the will — is the eye — the hinge—the key, it is "AND" it is used all through the will and statute.

Special Notice — is directed to the *support payments clause*: which states in part,

> "During the continuance of this trust, the trustees of my estate shall provide comfortable support and maintenance of each of my five children (named) during the life of each of them *"AND"* at the decease of each of them, then to the lineal

descendants together, if any, of each of them. (per stirpes).

The Residential Clause

The trustees "shall designate one of my houses for each of my said five children, so requesting it "*AND*" after the death of each of my said children, for the lineal descendants of each one of my children". (per stirpes).

The Distribution Clause (Statute)

"The whole shall descend, in equal shares to his children (excluded by trust) "*AND*" (and/or) (*then*) to the *lawful issue* of a *deceased child* by right of representation". (per stirpes)

The Will says in part:

"after the decease of all my five named children, all my estate in whatever form the estate shall *then* be shall then *vest in*. "AND" become the property of all of *my* lineal descendants". (per stirpes)

Note the similarity and identical form

In the statute and the will, the continuity of both are tied together by the word ("AND").

Any average intelligent man would find it difficult to interpret this simple language other than just the way it reads.

Perhaps (over simplification) is the factor which has caused many minds to look for complicated legal meanings.

Surely, a testator would seek simplicity for fear the will would want for clarity, which might cast it into statutory intestacy, defeating the testator's wishes. Incidentally, in event the estate was declared intestate, the result would be a (per stirpes) distribution by right of representation, which is not inconsistent.

The preponderance of (worthier title), logical evidence

and FACT appears in favor of (simplification). The bulk of opinion is in favor of per stirpes distribution by right of representation, as shown all through the will.

Will Directions (In Brief) by John Cassidy

A- "Upon the termination of the TRUST
B- after the decease of all of my said five named children
C- all of *my* estate
D- in whatever form the estate shall then be
E- shall then *vest in*
F- all of *my lineal* descendants
G- then living
H- in the same manner and proportions
I- as shall then be provided
J- by the then existing laws (1918-1961)
K- for the descent among lineal descendants
L- of intestate property
M- it being *my* express intention
N- that no part of the body of *my* estate
O- shall vest in any person
P- until the time above especially fixed for the termination of this trust
Q- and at the termination of this trust, as aforesaid especially provided"

"MY TRUSTEES"

R- "for the time THEN being
S- shall *make all necessary conveyances* and transfers
T- to carry out the provisions of this will
U- insofar as it may be necessary
V- *to the persons* who shall be entitled to the same, as *specified"*.

Mr. Cassidy obviously repeatedly refers to *"my estate"*, although he presumably is dead and his estate is bequeathed and devised forever in trust. (Subconsciously) he intended to and did direct (how — (when) and to (whom) *his* estate shall vest. HIS TRUSTEES were to him only his

custodians who "shall make all necessary conveyances" — "to carry out the provisions of this will" "*to the persons* who shall be entitled to the same".

This man came as near as any man can, to *taking his money with him*, even after death.

There can be no doubt that his *will spoke*, as of the date of his death.

There can be no doubt that he intended to die (with children) and most certainly with (lineal descendants) — (direct or collateral).

There can be no doubt that "he" instructed *his* ("absolute owners") his trustees, who were his (alter ego) to act as he would — to deprive his children of any (fee) or transferrable estate. *HE* retained title in his trust, until all of his children were deceased, and then He (as of the date of his death) directed that "My Trustees" — for the time Then being — shall make all necessary conveyances and transfers, "to the persons who shall be entitled to the same, as *specified*" — Today the (manner), the lineal descendants are known.

The specified proportions, — are equally crystal clear.

(Namely) *as Specified in the Descent Statute.*

"And (and/or) to the lawful issue of a deceased child by right of representation".

Edythe & Ralph Dyer

June 5, 1962

Facts re: Cassidy Will

It would be difficult to assume the testator died in 1961 — whereas, his children and lineal descendants must be the heirs of a deceased person (no one can be the heir of a living person!)

Fact — If the statute is to be used — or applied it must be applied as the legislature intended and wrote it to be used. Assumption is not a fact.

Fact — The statute was protecting Mr. Cassidy and reserved for him (with or without his will) a place for his estate to go, as of the date of his death. His estate could have terminated (without a trust) in event his will was lost or voided.

Fact — If this will (or any other will) was declared void; for any reason, the estate would be cast into statutory intestacy; it would vest as of the date of the death of the testator. (Mar. 25, 1918 for Mr. Cassidy).

Fact — Whether the will spoke in 1918 or 1961 would not effect the final distribution, the testator died in 1918. The statute is built around that fact.

Fact — The doctrine of worthier title and the common law rule of property, rather than construction, provided without equivocation that a man cannot make his own heirs his purchasers (60F 21-29) (69NH372).

Fact — All contingent remainders require a reversion in the conveyor or as long as the remainder is contingent.

Fact — A contingent remainder must be created *at the same time* and *in the same instrument* as the prior particular estate (if one was created).

Fact — Remaindermen — always take as purchasers! Joint tenants are always purchasers, Joint Tenants are never created by descent.

Fact — Mr. Cassidy was not stupid, he was not foolish, he and Matthew Laughlin, his attorney, read the "whole" statute. He knew that he estate would not vest until his children were all deceased and the trust was terminated. That was the way they expected and directed it.

Fact — They looked at the descent statute and created a trust *for* his children, on the premise that he *would have* children living at the time of his death.

Fact — Mr. Cassidy and his attorney, understood what the second part of the descent statute said: namely — "If no child is living at the time of his death" — that as a

condition, was irrelevant, to what Mr. Cassidy was trying to accomplish. Because the trust and provisions for final distribution to "his" lineal descendants were based *UPON THE FACT THAT HE DID HAVE* children living at the time of his death. That is the way he understood the statute to read. They would not consider the unnatural ("if *no* child is living at the time of his death").

Fact — Matthew Laughlin, Mr. Cassidy's attorney, admitted under oath that Mr. Cassidy intended for his estate to vest in his heirs at law, if no child was living at the time of his death.

Fact — Property acquired by (descent) is property which the law, upon the death of the ancestor, casts on the heir. *Orr* v. *White*, 6 NE 9 9 "Title by Descent" Blacks Dic. 3rd Ed.

Fact — Mr. Cassidy and his attorney could not intelligently (looking at the statute) set up a trust "for" his children, and at the same time expect, at its termination (with a straight face) to expect anyone to apply the second half of the statute. Which reads "If No child is living at the time of his death". He would not build a trust — carefully provide lifetime income and homes for his children and "his" lineal descendants (on a per stirpes basis), and rationally expect his estate to be settled as though he died without children or at some other date than his actual date of death. It is incredible, impossible, it was not his intention.

Fact — The second part of the descent statute states a condition: "If no child is living at the time of his death", if factually answered, it leaves only the first part of the statute effective. Because the second half is irrelevant, never intended to be used and is in violent conflict with a normal man's interpretation of simple grammatical words.

Note — If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule

of law and the other not, the construction which will not offend the rule is to be adopted by the court. *Towle* v. *Doe*, 97 Me. 433.

Fact — Any "assumption" or conclusions not based upon *fact* is false, and could lead to anywhere.

A man dies as of the date of his death not at the termination of his trust. If he died leaving children — then he died leaving children. That is the basis or starting point for all considerations. If Mr. Cassidy died without children then the trust was never created, because the estate would have vested prior to the trust, as any intestate estate.

Fact — It is impossible to utilize the statute, or the trust; — the estate is intestate from the start; — (unless it is recognized that Mr. Cassidy did leave children).

The ultimate fact, the fundamental determination for Mr. Cassidy's whole consideration, was his children. *AND* his lineal descendants, AND the first consideration in the *statute*, for a man with children, at the time of his death.

To alter the death date or to assume a different date — is to remove the ultimate and principal object of inquiry. The material substance, the corpus delicti, the foundation for the statute; the man's prime thoughts and intentions. His wishes when he wrote the will, were based upon the fact, — that he knew and hoped that he would have children living at the time of his death. He knew and *surely hoped* the (IF) condition in the statute would not apply to him (if no child is living at the time of his death). To Mr. Cassidy this may have been a grim possibility, but surely it was not his plan or *intention* to utilize this part of the statute.

Fact — The Maine Legislature did not write *parts* of the law for Mr. Cassidy. The Maine Descent Statute is well written, practical and its mechanical parts are synchronized to be constant, the first part of (R.S. 1954 Ch.

170 — Sec. 1, Subsec. II) cannot be split into halves to satisfy or convenience a situation. Because there is no two halves, there is only the body of the statute, and two (if) conditions, all must be used together. The body of the statute, cannot be dropped completely and the (if) condition substituted for the whole statute.

The statute fixes its own rules, and by these rules we must be governed. *Messer* v. *Jones*, 88 Me. 353 (67 Me. 583) (45 Me. 115).

In brief:

The whole conception of the matter has been "confused" when in fact the issues are as simple as truth itself.

1- The statute spoke in 1961, the will speak in (1918 and/or 1961).

2- the estate did vest as of the termination of the trust 1961.

3- after the death of the last child

4- But, not, in the (manner and proportions as though the testator died at that time (without children).

5- The points which have not been clearly understood, is that the estate "must descend" — "from him" as "any" intestate estate would do, (first) to his children "AND" (or) (then) to the lawful issue of a deceased child by right of representation, as any intestate estate. How else could he

   1- retain control of his estate
   2- deprive his children of any fee and
   3- vest his estate in his lineal descendants as his intestate property 44 years after his death.

6- Mr. Cassidy created (1) a trust for the lives of his children (2) to terminate it, in effect, cast the remainder of his estate "as intestate property" to his lineal descendants, just the way the will and

statute reads, in over simplified terms which any legislature or jury would by necessity, be required to quickly understand.

In Conclusion

(Intention)

There is *no* evidence to show or imply that Mr. Cassidy ever intended to utilize the so-called second half of the descent statute. "If *no child is living* at the time of his death, etc., etc." Because all of his plans, hopes, thoughts, the rest of the will, every consideration was *for* his children — whom he expected *to be living* at the time of his death. No reasonable man would expect (or be expected) to utilize a sentence which would require *his children* to *predecease* him. It was the last thought in his mind. He would have rewritten his will if the contingency had happened — because this will was for his children, and (AND) then to his lineal descendants, both were his first concern, exactly as the will and statute reads. (87 Me. 132 — *Spear* v. *Fogg*).

Date of Death —

Whereas the (will and the court) require that the condition "*no child is living*" to apply as of June 9, 1961.

And whereas the (descent statute) requires *children* "*to be living*" as of the date of the testator's death, in order for the statute to function and be utilized, *with the will*, the only correct harmonious solution which can satisfy both conditions, would be to admit the "fact" that the will *spoke* as of the "*ACTUAL*" *date* of the testator's death and the (then existing) *statute spoke* as of June 9, 1961, for a man who factually died March 25, 1918, — which he has so grammatically admitted.

Judge Harold Murchie and Judge W. R. Pattengall both contributed, most of the verbage for this last paragraph. Judge Raymond Fellows told us he believes the law court would probably divide the estate into thirds, but he wasn't

sure just exactly how. *Judge Merrill was on and off the fence.

Matthew Laughlin
Counseller at Law
Office, 7 Hammond Street.

Bangor, Me., December 2, 1918.

Edgar A. Simpson, Esq.
Merrill Trust Bldg.,
Bangor, Maine.

In matter of contest over the will of the late Mr. John Cassidy

Brother Simpson:-

I became acquainted with Mr. Cassidy when I first came to Bangor to read law, nearly forty years ago. I may have done some legal business for him, and probably did, but I do not recall anything in particular until September, 1897. I began to do professional business for him then, and continued to do business from that time until the latter part of the year 1909.

The first important business I did for him was in connection with the Penobscot Lumbering Association of which he was President. Charles P. Stetson, Esq. and myself brought suits in favor of the Association in 1897, and from that time until 1909, when I ceased to do business for him, I did a great deal for him. The greater part of it being in connection with corporations in which he was interested, or wild lands in which he was a part owner, complaints for flowage and petitions for partition, etc. etc., and the organization of the corporation, John Cassidy & Son, as I recall.

There was considerable litigation during those years, in which he was interested either individually or as John Cassidy & Son. Judge Stearns and myself were associated

* Enclosed letters

in quite a number of cases tried for him, and Judge Bailey and myself had an important case in behalf of the Eastern Trust & Banking Co. of which he was then President.

He wished to understand all about the cases in which he was in any way connected, either individually or otherwise. He used to come to my office very frequently and when he had any important business, either in court or otherwise, frequently he would come to my office on his way to the Bank about eight o'clock in the morning and consult with me from that time until nine, when he went to the Bank.

I find on my ledger a charge, February 21, 1906, drafting will of John Cassidy. I have no question that that will which I then drafted is the original will which has been filed in Probate Court. I recall in a general way that he took very much pains and a good deal of time in the preparation of that will. He discussed with me every feature of it. I remember distinctly that the will I drafted for him was not executed in my office. He took it from my office, when it was finally completed, with the remark that he would take it over to the Bank and have some of the "boys" act as witnesses. He stated to me some of the reasons why he made the will as he did. He said his intention was to give each of the children sufficient for comfortable support. He thought more than enough for that purpose might be a hindrance rather than a help, making the remark in his peculiar way that the more money a person had the more trouble he had. He also stated that he thought it was fair to all the children to select the oldest and the youngest to act as executors and trustees.

He further stated that perhaps it might be thought he was too liberal to James ("Jim" as he always called him) in allowing him ten thousand dollars a year for taking charge of the estate after his, Mr. John Cassidy's decease,

but he said he did not consider the sum as at all unreasonable, because in his judgment Jim with his ability and experience could go outside and earn more than that sum each year.

As to any codicil or codicils I cannot speak with accuracy. I remember of drafting one codicil, at least, for him and I do not remember of drafting any other.

There is a charge on my ledger, January 18, 1907, drafting codicil to will of John Cassidy. I do not remember whether that codicil was executed in my office. My best impression is that it was, because I have no recollection whatever of his making any statement regarding it, such as he made when he took the will out to have it executed. As to the contents of the codicil, my recollection is good, that the increased to some extent the yearly allowance to his children. I cannot remember as to what extent, and I have a faint impression that he also made some change or some provision in it for his sister, Mrs. Herlihy.

I kept my ledger account usually charges against John Cassidy & Son, and put everything on that. It would be an enormous task to go through my books and pick out all of the legal business I did in which Mr. Cassidy was interested in some way, because the charges might be against a certain town, or against some individual owners of the town, or against some corporation.

I went to the Legislature one or two sessions at his request in connection with the Penobscot Lumbering Association.

No matter what the business was in which he was interested, and no matter how many other people were interested with him in the numerous matters relative to wild lands, division of towns, etc., and petitions for assessment of damages for flowage, etc., and any of the corporation litigation, he was the one that attended to most of it personally, and would discuss every feature of it with me,

and come to the office times and times without number for some purpose in connection with the business in hand. In the dozen years or more in which I did in some way so much professional work for him, from 1897 to 1909, he did not change in the slightest degree. He was just as keen, intelligent and interested the last day as he was the first. One explanation can be given of the unusual and unique method he had of wishing to discuss the legal phases of anything in which he was interested.

He was about the same age as John Varney, a lawyer who began to practice in Bangor about the time that Mr. Cassidy first engaged in business. They were the most intimate friends, socially and otherwise. Mr. Varney was one of the leading attorneys of his day, and during all Mr. Varney's life did business for Mr. Cassidy, continuing up to the time of Mr. Varney's death, and I knew that Mr. Cassidy frequently told me that he used to talk with Mr. Varney constantly about his matters, and Mr. Varney would explain to him what chances he had to win or lose, and in that way it became a habit with him to talk with his counsel on every phase of his business; therefore, he followed the same coarse with me.

Of all the clients I ever had, I think I can safely say that he gave more time to, and was more interested in, his business than anyone I ever knew.

Very truly yours,

M. LAUGHLIN

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On August 6, 1940

Harold Murchie; (later Chief Justice of Maine Supreme Judicial Court)

Said when asked his opinion of the Cassidy will;

"I disagree with your premise, however I agree with your conclusions."

"The will speaks from the date of the death of the testator and is implamented by the Maine Descent-Statute, as of the decease of Mr. Cassidy's last surviving child".

"I have no idea what the law court will say, probably by right of representation."

(Memorandum made by Ralph Dyer, Jr. 8/6/40)

Letter to J. W. Cassidy from Edward F. Merrill

I have given a great deal of careful study to the interpretation of the residuary clause in your father's will providing for the distribution of the residum amont his lineal descendants. My first impression was that, if, at the termination of the trust, the lineal descendants consist of grandchildren or grandchildren and the descendants of grandchildren, the corpus of the estate would be divided into as many shares as your father left children who had issue then living, and that these shares would descend by right of representation to the issue of such deceased children. It is my best opinion however that, when the time for distribution comes, all lineal descendants standing in an equal degree of relationship to your father would take equal shares, and that those of a more remote degree would take the share which their ancestor would have taken.

There are no decisions in this state which I can discover which are exactly in point. There are decisions which would incline one to take either view. On the whole, however, I believe that the manifest purpose of your father's will was to postpone the vesting of the ultimate residue of his estate until after the death of the survivor of his children and that it was then his desire that his lineal descendants of equal degree at that time should share equally, and that the more remote take by representation.

There is no way to get a construction of this by the

court at the present time as the rights of the residuary legatees are clearly made to depend on the law of descent in effect at the time of the distribution. While our present law of descent has been in force for many years and probably will never be changed, I believe that, if the court was asked to construe the will, they would say, "We cannot presume that the law will remain as it is and therefore a decision might be an idle gesture on our part."

It had occurred to me however that, as in your will you do not provide for the distribution to your nephews and nieces until after the decease of the survivor of your brothers and sisters, your will could be so drawn that your desire could be carried out, whichever construction the court might put upon your father's will.

We can both be thinking this phase of the matter over and, when I see you, we can talk it over in detail.

Very truly yours,

MERRILL AND MERRILL

(Signed) By EDWARD F. MERRILL

EFM.W

(See Will of James Cassidy)

See will of James W. Cassidy, dated August 7, 1934;— deceased and probated in Penobscot County, State of Maine, soon after his deceased (March 19, 1938).

This will presumably written with the advise of Edward F. Merrill; states in part:

> "Whereas I cannot be certain whether under said provision of my father's will and codicil above set forth, my niece, Jane Murphy (Sullivan) daughter of my sister, Mary A. Murphy, will receive the same share and proportion thereof than such and each of my nephews and nieces who are the children of my brother, John F. Cassidy, and who may be living at the termination of said trust created by my father

and who may be living at the death of the survivor of my said sisters and brother,"

Another part:—

"if the said Jane Murphy (Sullivan) is to receive a *greater share* of my father's estate than each of the children of my brother John F. Cassidy, who is living at the decease of the survivor of my said sisters and brother, *I wish*, so far as possible in the disposal of my estate to *equalize* the amounts *received from both estates* by my said nephews and nieces who are the children of Mary A. Murphy and John F. Cassidy and who may then be living."

No mention is made of (Edythe Rice Dyer) the only child of his (deceased sister) Rosella Cassidy Rice.

[Letterhead — Pattengall, Goodspeed & Williamson]

June 20, 1938

Ralph A. Dyer, Jr.
199 Exchange Street
Bangor, Maine

Dear Mr. Dyer:

Replying to yours of the 18th, I have *no question* but that on the death of the last of John Cassidy's children, the body of the trust estate will then vest in the grandchildren, the children of each of the original family taking the share *which would have gone to their father or mother*, had no will been made. In other words, if Lucille has no children, the Estate would divide in three equal parts, one part to the children of John, one to the children of Rosella, and one to the children of Mary.

On the second proposition, I have already written Ray that I had a matter which I desired to take up with him, not mentioning what it was but suggesting an appointment. I should hear from him in a day or two. I think there is a fair possibility of recovering the money which should have

been paid to your wife, although the case is not entirely free from doubt.

Concerning your suggestion in regard to fees, there is a provision of law in Maine which makes illegal any arrangement for an attorney to take a case on a stated percentage. It would, therefore, be impossible to definitely agree with your proposition in regard to compensation. The only way to arrange that matter is on the basis that if the Estate paid the bill, the fees would be fixed by the Probate Court; otherwise, if the fees and expenses had to come out of the amount recovered, only reasonable fees would be charged. In any event, I would assume that actual expense properly incurred in connection with the matter would be paid regardless of the result of the litigation.

Yours very truly,

WRP:B

(s) W. R. PATTENGALL

[No. 935]

STATE OF MAINE

Supreme Judicial Court,
sitting as a Law Court.
June Term, 1962.

RE: Petition for Review of Law Court Decision
in
MURRAY v. SULLIVAN, et als

Consideration having been given to the Petition for Review of the Decision of the Law Court, filed by Edythe Rice Dyer, one of the defendants in the case of *Murray v. Sullivan, et als*, opinion filed March 26, 1962, it is

ORDERED that said petition be and it hereby is denied.

June 19, 1962

WALTER M. TAPLEY, JR.
For the Full Court
(excepting Chief Justice Williamson
who did not sit on the case).